In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE INTERSTATE COMMERCE COMMISSION, appellant,
v.
THE ALABAMA MIDLAND RAILWAY COMPANY, The Central Railroad and Banking Company of Georgia, et al. } No. 563.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY BRIEF FOR APPELLANT.

This brief is not intended to argue fully all the questions arising upon this record, but, in replying to Mr. Baxter's argument to give a *résumé* of certain points which seem to the undersigned to dispose of the case, and to set forth the evidence of the most important witnesses bearing upon these points.

The opinion of Mr. Commissioner Clements states very clearly and fully the grounds upon which the Interstate Commerce Commission proceeded in making the

important order now brought before this court for review. The opinion is unfortunately printed in the record in very fine type and in double column, so that it is somewhat difficult to read. It will be found better printed

Traced from Travelers' Official Guide.

(omitting unimportant branch lines. Eufaula should be on River).

in the official reports. (*Board of Trade of Troy* v. *Alabama Midland R. R. Co. et al.*, 6 Int. C. C., 1.)

The opinions of Judge Bruce and of the Circuit Court of Appeals are very meagre. Their statement of the

controversy seems to the undersigned somewhat confusing. They set forth the questions as raised before the Interstate Commerce Commission by the petition of the Board of Trade of Troy. But that petition, if the undersigned is correctly advised, should have cut no figure in the case after it came in court. The Interstate Commerce Commission were not obliged to treat the petition as if it were a declaration of common law, a bill in equity, or a libel in admiralty. They had the right to investigate into the whole subject matter and inquire whether any injury or damage has been sustained, not merely by the complainants, but by other parties aggrieved (§ 15). There is no claim that the Commission have in this instance gone beyond the bounds of the subject matter of the petition. They have, however, adopted their own language, very carefully chosen, in drawing their mandate; and have changed the order and somewhat modified the substance of the petitioners' prayers for relief.

THE COMMISSION'S ORDER.

This will be found at pp. 67–9 of the record.

It prohibits the two competing railroads at Troy (the Alabama Midland and the Central of Georgia) and the other railroads and steamboat lines which unite with them in making through rates to Troy from charging, etc., "any greater compensation in the aggregate for services rendered in such transportation than is specified as follows:"

> 1. On class goods shipped from Louisville, Ky., St. Louis, Mo., or Cincinnati, Ohio, to Troy aforesaid, no higher rate of charge than is now charged

and collected on such shipments to Columbus, Ga., and Eufaula, Ala.

2. On shipments of cotton from Troy aforesaid through Montgomery, Ala., to New Orleans, La., no higher rate of charge than 50 cents per hundred pounds.

3. On shipments of cotton from Troy aforesaid for export through the Atlantic seaports, to wit, Brunswick, Savannah, Charleston, West Point, or Norfolk, no higher rate of charge to these ports than is charged and collected on such shipments from Montgomery aforesaid.

4. On shipments of cotton from Troy aforesaid to the ports of Brunswick, Savannah, or Charleston no higher rate of charge than is charged and collected on such shipments from Montgomery aforesaid through Troy to said ports.

5. On shipments of class goods from New York, Baltimore, or other northeastern points to Troy aforesaid no higher rate of charge than is charged and collected on such shipments through Troy to Montgomery aforesaid.

6. On shipments of phosphate rock from South Carolina and Florida fields to Troy aforesaid, no higher rate of charge than is charged and collected on such shipments through Troy to Montgomery aforesaid.

INTERSTATE COMMERCE ACT.

The first two paragraphs of the order are based upon § 3.

The last four paragraphs are mainly based upon § 4. They are based upon § 4 so far as traffic over the Alabama Midland line is concerned. As respects traffic over the Central of Georgia, they are under § 3, since shipments

over that line to Montgomery do not pass through Troy. The bearing of these paragraphs upon shipments by the Central of Georgia will not be discussed in this brief, because it is not a question of the slightest practical importance; for if this court shall direct the orders of the Interstate Commerce Commission to be obeyed by the Alabama Midland, and the rates to and from Troy thereby reduced, the Central of Georgia will doubtless reduce its rates likewise rather than give up its Troy business.

The sections, so far as material, are as follows:

> § 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. * * *
>
> § 4. That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, *under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance;* * * *

The proviso to § 4 is immaterial here, because no application has been made under it to the Interstate Commerce Commission; and because, had such an application

been made, the decision of the Commission would have been unreviewable. It is as follows:

> *Provided, however,* That upon application to the Commission appointed under the provisions of this act, such common carrier may, *in special cases,* after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of persons or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this act.

The powers of the circuit court were derived from § 16, which provides that upon summary application and notice—

> Said court shall proceed to hear and determine the matter speedily as a court of equity, * * * in such manner as to do justice in the premises.

that it may prosecute—

> All such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition; and on such hearing the findings of fact in the report of the Commission shall be *prima facie* evidence of the matters therein stated.

The court is required to grant an injunction or other proper process if it appear—

> That the *lawful* order or requirement of said Commission drawn in question has been violated or disobeyed.

It will be noticed that there is no general authority to take evidence in the circuit court; that the custom of taking evidence has sprung from the court's authority

to make needful inquiries; and that these inquiries relate to the question whether the Commission's order was lawful.

COMPARISON OF §§ 2, 3 AND 4.

The Circuit Court of Appeals quote at length from the opinion of the Circuit Court in the Texas Pacific case. That case concerns only §§ 2 and 3. The former has but an indirect bearing upon this case, in so far as it contains the same phrase "transportation * * * under substantially similar circumstances and conditions."

§ 2 prohibits certain acts of discrimination between individual shippers at the same locality. What these prohibited acts of discrimination are is a matter easily discoverable by comparison with certain provisions of the sixth section, with the authorities upon the English "Equality Clause" from which this provision was taken, and with the Senate report which introduced it to legislative consideration (see brief for defendant in error in the Wight case, No. 494 of this term). It is not left to the Commission, court or jury to decide whether or not these prohibited acts of discrimination are "unjust." If any one of them is committed, the "common carrier shall be deemed guilty of unjust discrimination." Whether any other form of unjust discrimination is prohibited by this section may be regarded as an open question. As to the matters specified, it has a rigid operation, and leaves nothing to the discretion of the tribunals by which it is to be administered.

§ 3, on the other hand, provides no rigid or specific rule, but is directed against all advantages which are

"undue or unreasonable." It applies between either individual or localities. § 4 again provides a rigid rule, applicable as between different localities situated upon the same line of commerce, giving no discretion to court or jury. It differs, however, from § 2 in that it contains a proviso allowing the Interstate Commerce Commission, at its discretion, to dispense with the requirements of the section "in special cases." It has been a much mooted question whether competition is to be treated as one of the "circumstances and conditions" mentioned in the long and short haul clause, or as one of the "special cases" mentioned in the proviso. This is discussed at length by the undersigned in the Ionia case (No. 539 of this term).

FUNCTIONS OF COMMISSION AND COURT UNDER § 3.

(1) *Questions to be examined by the Commission.*

Two questions are submitted to the Commission by this section: first, whether a preference has been given; and, second, whether it is undue or unreasonable. The second of these questions is addressed largely to the discretion of the Commission.

(2) *Form of order by the Commission. Shall it fix a maximum rate?*

Sometimes the Commission finds, not only that a preference has been granted to one locality over another upon insufficient grounds, but that the two localities ought in fairness to have the same freight rate. In this case the order may simply state that the rate to one locality shall be no higher than that to the other. Sometimes, however, while an unreasonable preference has been given to

one locality, it is fairly entitled to some degree of preference. The unfairness is not in the existence of the preference, but in its extent. In such a case it is necessary for the Commission to make some order; but an order in the form above given would not be proper.

In the case last mentioned it is necessary for the Commission to fix a *maximum* rate. The order must read either "that the freight rate to locality A shall not exceed x cents" or "that the freight rate to locality A shall not be more than x cents below the corresponding rate to locality B."

It would be absurd for the Interstate Commerce Commission to make an order directing the railroad company to desist from an undue and unreasonable preference, without indicating within what limits a preference would be due and reasonable. Presumably not only the fact of unfairness, but the degree of unfairness, has been in issue and has been heard and decided by the Commission.

In the present case, for instance, the rate of 68 cents from Troy to New Orleans is held to be unduly and unreasonably disadvantageous as compared with the rate of 50 cents from Columbus to New Orleans. Suppose that the Commission considered that a preference of 3 cents to Columbus would be due and reasonable. Could it not say so? Would it be obliged to rest with saying that the rate of 68 cents was undue and unreasonable, leaving the railroad company to experiment by a succession of slight reductions in order to ascertain the extent of the Commission's liberality? Is the railroad to reduce its rate a half cent at a time, requiring the Commission on each occasion to give a new notice, and, after a new hearing

"within a reasonable time," make a new order and give the railroad company 30 days to comply with it? Would the situation ever remain the same at the conclusion of the term of years required by such a process? Would the Interstate Commerce Law so construed be anything but a delusion and a mockery?

The power of the Commission in passing upon a controversy properly submitted to it to fix maximum rates is so clearly involved in the law, that we should not have alluded to it, but for the construction which has been put upon certain *dicta* in the Social Circle case, 162 U. S., at pp. 196–7. This point was fully and ably argued by Mr. Cooper in the Florida orange case, No. 141 of this term, is fully treated in the brief submitted upon this argument by Mr. Shaver, and is the subject of a special brief filed by Mr. Edmunds. Hence it is not here further discussed.

(3) *Extent of court's power to review the Commission.*

This has been discussed by the undersigned in his brief in the Ionia case, No. 539 of this term, to which reference is made (pp. 59–67). It is respectfully submitted that the proceedings of the railroad companies during this controversy have been a travesty of justice. They introduced no testimony whatever upon the questions between Troy and Columbus and Eufaula, and only a single affidavit upon the question between Troy and Montgomery. They waited until the issues were made up in the Circuit Court, and then undertook to try the case *de novo* upon new evidence, under the court's general power to make needful inquiries into the lawfulness of the Commissioner's order. Thus Judge Bruce, in sustaining their contentions, was able to say (p. 124): "The

case made here is not the case as it was made before the Commission." Such procedure was censured by this court in the Social Circle case, 162 U. S., at p. 196. Mere censure, however, will never rectify the wrong. It is maintained in the Ionia brief above referred to that the railroad company should be held estopped in such a case, and should be sent back to retry its case before the Commission, obeying the Commission's order in the *interim*; and it is further maintained that the court has no power whatever to review the Commission's judgment upon a controversy over which the Commission has full jurisdiction.

For the court's duty under the Interstate Commerce Act is not merely to enforce orders of the Commission which are not erroneous, or which would not be reversed upon appeal, were the Commission a *nisi prius* judge and were the Circuit Court an appellate tribunal. The Circuit Court is bound to enforce the order of the Commission whenever "it be made to appear to such court * * * that the *lawful order or requirement* of said Commission drawn in question has been violated or disobeyed." The court is only authorized to inquire whether or not the Commission has misconstrued the statute and thereby exceeded its power. There is no general jurisdiction to take evidence upon the merits of the original controversy. The "inquiries" which the court thinks needful must be directed to some *quasi*-jurisdictional point. The provision for these "inquiries" is intended to guard against any unintentional overstepping of its powers by the Commission, due to mistakes of fact; and to prevent the application of the general rule as to

quasi-jurisdictional issues, that the finding of the inferior tribunal is "as conclusively presumed to be correct as its finding with respect to any other matter in issue between the parties." (*Noble* v. *Union River Logging R. R. Co.*, 147 U. S., 165, 173.)

Questions under the third section are generally questions of fact and not of power, and hence unreviewable. (Compare *Diphwys Slate Co.* v. *Festiniog Ry. Co.*, 2 Nev. & Macn., 73, 81.)

(4) *Power of the court to modify the Commission's order.*

Suppose that the Commission should hold a preference of one locality over another to be altogether undue and unreasonable, so that the two localities ought to have the same freight rates. Suppose that the court should differ in opinion with the Commission upon this point, but should differ only as to the extent of unfairness. Suppose that the Commission, as in the present case, considers that Columbus should not be preferred at all above Troy; so that, Columbus having a 50 cent rate, Troy's rate should be reduced from 68 cents to 50 cents. Suppose that the court, however, should think that, while the preference to Columbus is undue and unreasonable in amount, it is nevertheless entitled to some preference; and that the Troy rate, therefore, should be reduced to 53 cents. We have already argued under the last subheading that the court would have no jurisdiction to interfere. Assuming, however, that it has the jurisdiction to interfere, then it should not nullify the Commission's order entirely, but should modify it by making the

reduction to Troy only 15 cents instead of 18; and, as so modified, should enforce it.

This power of modification arises from the provision that the court "shall proceed to hear and determine the matters speedily as a court of equity * * * in such manner as to do justice in the premises" (§ 16).

The Texas Pacific case (162 U. S., at pp. 236–9) does not militate against this contention. That case was quite peculiar. It turned upon the question whether ocean competition from Liverpool around Cape Horn to San Francisco was an element which could be taken into consideration in fixing freight rates on through traffic, part water and part rail, from Liverpool *via* New Orleans to San Francisco. The Commission and the lower court had held that the competition was not to be considered at all, and therefore had not discussed the question whether the local rates from New Orleans to San Francisco were reasonable, either in themselves under § 1, or in comparison with the through rates under § 3. This court held that such a question could not be discussed for the first time in the Circuit Court of Appeals.

In the present, as in most cases under § 3, the Commission has fully considered the element of competition in reaching its conclusions; and (assuming that the court has any jurisdiction at all to review its decision in this particular) it would seem clear that the order of the Commission, if partly justified by the facts in the case, should be enforced to the extent that it is justified, and limited in so far as it is not justified.

FUNCTIONS OF COMMISSION AND COURT UNDER § 4.

This section is discussed at length by the undersigned in the Ionia brief, No. 539 of this term (pp. 41–6, 50–1, 67–9), to which he begs leave to refer.

It may be enough to recapitulate the following points there made: That differences in size and tonnage of different localities, and differences in extent of competition between them, do not constitute dissimilarities of "circumstances and conditions" within the meaning of the long and short haul clause. That, when they merit relief from its operation, they constitute "special cases" within the proviso. That the court therefore has no jurisdiction, upon a bill to enforce the orders of the Commission, to consider any of these elements. That the only body which has the power to relieve railroad companies from the operation of the long and short haul clause on account of the existence of competition, or any other similar element which would make its application unfair, is the Commission itself, which is bound to consider the question upon application by the railroad company, but whose decision is discretionary and unreviewable.

Our reliance is upon the statute itself, in its wording, context, and history, and upon the actual decision made by this court in the Social Circle case. The learned counsel for the appellees relies upon certain *dicta* of the court in that case and the Texas Pacific case, which, as he construes them, contravene both his argument in those cases, and as we believe, the statute as well.

MR. BAXTER'S THEORY OF §§ 2, 3 AND 4.

§ 2. Among his extracts from opinions of this court upon the section, Mr. Baxter fails to quote its statement that the provision is "modelled upon" the English "equality clause" of 1845. (162 U. S. at p. 222.) This is undoubtedly true. The language was much improved by Congress, but the thing prohibited remains the same, unless the omission of the bracketed words in the English act import a change: namely, an overcharge—

English, 1845.	American, 1887.
in respect of all passengers, and of all goods and carriages of the same description, and conveyed or propelled by a like carriage or engine, [passing only over the same portion of the line of railway] *under the same circumstances.*	for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic *under substantially similar circumstances and conditions.*

The English equality clause of 1844 relating to the Great Western railway was construed to have the same meaning, though it contained the words "like" circumstances and "like" description. (9 Exch., at p. 561; L. R. 4 H. L., 239.) The words *substantially similar circumstances* are equivalent thereto (3 App. Cas., 1038); and nobody has ever suggested that anything was added by the tautological "and conditions." Congress, when it adopts English legislation, presumably adopts the English judicial construction also. (145 U. S. at p. 284.) This presumption is a natural and strong one, and has been applied to many other borrowed statutes as well as this one.

Mr. Baxter correctly states that the English equality clause did not apply "unless the same class of goods were shipped between the same points of departure and arrival,"—"passing over no other part of the line." That is true; and the same rule was applied by this court in the Texas Pacific case as between through and local traffic, holding that through traffic might be carried from A to B *en route* from C at a lower rate than local traffic between A and B. Whether the American equality clause is broader in its application by reason of dropping the bracketed words, (thus equalizing rates from A to B with rates from B to C, when conditions remain the same), or whether it dropped those words merely because they were surplusage (as the undersigned believes) is immaterial here. Whichever way the point is decided, it can not make "substantially similar" a narrower phrase than "same," or establish any distinction between a condition and a circumstance.

Mr. Baxter fails to bring clearly out the fact that there may be competition between two railroads, between the same cities; that these railroads may be differently situated with respect to an individual shipper; that their competition for that shipper's patronage is precisely like the competition for the patronage of a town or city; that his strategic position may vary as widely from the average as does that of the most favored basing point; and that if the "circumstances" of the statute referred to the strategic position of the shipper, as well as to matters affecting the cost or risk of carrying his goods, the section would permit great variation in rates between shippers over the same line, between the same points.

Mr. Baxter is correct in stating that the famous cases of Sutton, Evershed, and Denaby (which are set forth in full in the Wight brief) are not directly in point in contests between different localities; but they construe the meaning of "like circumstances" or "same circumstances" in the English equality clause (and thus, indirectly, of "substantially similar circumstances" in our clause) and settle that it does not refer to the personal importance or strategic position of the shipper, except so far as the cost or risk of carriage is thereby affected—that it has no reference to questions of competition. The importance of these cases is easily seen when the same phraseology is discovered in the fourth section of our statute. He apparently does not fall into the error of supposing the Evershed case, in this aspect, to be overruled.

It is when he comes to deal with the legislative history of our equality clause that Mr. Baxter falls into the gravest error. He claims that the phrase under discussion (though evidently adopted from the English statute, and left unchanged except to slightly strengthen the statutory prohibitions) was introduced by Senator Cullom's Committee to cover, "among others, the important conditions arising out of the competition of carrier with carrier." In the Wight brief (pp. 58–9) we showed, by Senator Cullom's own report upon the bill, that variations in rates to meet competition of carrier with carrier were the very things which his committee was most seeking to avoid. Doubtless they thought that an adoption and broadening of the English language, already

long since judicially interpreted, was the safest way to attain their end.

§ 3. There is so little to be said about the construction of the undue preference clause, that it would hardly be necessary to refer to it were it not that Mr. Baxter appears to think that the English cases upon its application, such as the famous case of the passengers from Motherwell to Edinburgh, are authorities upon the controversy between Montgomery and Troy. There is only one issue between these cities which depends upon the undue preference clause, and to that controversy the English cases have no analogy.

Nor have these cases, which Mr. Baxter so pictorially represents, any analogy to the controversies between Troy, Eufaula and Opelika. Since, however, he lays so much stress upon the Phipps case (Brief, pp. 80–2) we may venture to suggest that he advise his client to treat Troy, in comparison with Montgomery, as well as the Phipps' colliery was treated by the English railroad company. The Liverpool Corn Traders' Association case (pp. 82–4) would be analogous to the controversy over shipments of cotton to New Orleans had this controversy come before the court in the first instance, and had there been any controlling competition shown at Eufaula and Opelika. The case under the Colorado constitution on which so much reliance is placed (pp. 86–91) simply holds that, under a provision somewhat similar to the undue preference clause, a railroad is not required to form a through line with any other railroad unless it

pleases. The other American cases cited are also not analogous to either of the first two requirements of the order involved in the case at bar.

§ 4. Mr. Baxter's account of the legislative history of the long and short haul clause is principally notable from his discovery of the fact that Senator Harris, who suggested the insertion of the phrase in question, did it in order *to adopt "the language of the second section"* (p. 102), and as a substitute for certain language proposed by Senator Aldrich. Curiously enough, he fails to show what Senator Aldrich's proposition was, or its motive. If he had done so, he would have exposed the fact that there was no such motive expressed as to provide for cases of competition. The bill as it was then before the Senate is printed by Mr. Baxter at page 104 of his brief. It failed clearly to provide for freight classification and other differences essential to the carriage itself. It was this defect which the Senators were endeavoring to remedy. Mr. Aldrich said: "I should like to know how it is possible to say how much property or of what kind, and it is absolutely necessary to make the bill intelligible, that it shall be of like class and quantity of property transported under similar circumstances and conditions." (Congr. Record, May 12, 1886, p. 4400.) The case of competition was one of the "special cases" referred to in the proviso, and was thus covered already, before Senator Aldrich had made his criticism. No more careful course could have been taken, in order to avoid this criticism without destroying the value of the enactment, than

to adopt the phraseology of the second section with its long-settled interpretation.

The debates of Congress are not competent evidence, and, though favorable to our contention, we have therefore not relied upon them.

A most extraordinary misapplication is made, at page 108 of the brief, of Mr. Justice Jackson's reference to competitive conditions in the party rate case (43 Fed. Rep., at pp. 53–4). The brief is so drawn as to make it seem that this reference is made in connection with a discussion of "the second and third sections," and the quotation is so intertwined in the argument as to give it an apparent bearing, through the second section, upon the fourth. The sentence quoted by Mr. Baxter is contained in a paragraph discussing "the 'undue preference' branch of the English acts" (p. 53). It is preceded by the following words:

> Our act to regulate commerce having adopted substantially sections 2 and 90 of the English railway traffic acts of 1854 and 1845, the settled construction which the English courts had given to their terms and provisions must be received as incorporated into our statute. *McDonald* v. *Hovey*, 110 U. S., 619.

Mr. Justice Jackson, while he seems to have but partially read the English authorities under the equality clause, and while he used some broad language that has been made use of to obscure and overslaugh the provisions of the statute, nevertheless clearly indicates here that he recognizes competition as bearing only on the third section. The only authority quoted by him upon the equality clause (Mr. Justice Blackburn in the Sutton

case, L. R. 4 H. L. at pp. 238 et seq.) gives it a construction which excludes the element of competition.

Judge Cooley's interpretation of the fourth section in the Louisville & Nashville case is much in line with Mr. Baxter's contention, although Mr. Baxter is not satisfied to accept it. It was contrary to the general opinion of the bar at the time, and has been generally abandoned since. It is inconsistent and can not stand careful analysis, or comparison with other sections and with the English acts. It was formally disavowed by the counsel for the Commission, as well as by Mr. Baxter, in the Social Circle case. Its errors were doubtless due to the fact that the fourth section was considered mainly by itself, without sufficient comparison with the second section; to the fact that the English authorities are not examined; and, in fine, to the fact that the Commission were unaided by counsel, except for the railroad companies.

Judge Deady's discussion of the long and short haul clause, made about the same time, was under similar disadvantages.

Subsequent cases in lower courts have simply followed the lead of these early cases, and thus error and confusion have been piled up and the Interstate Commerce Law practically emasculated. The Commission itself has felt obliged to follow its erroneous precedent, until it should be overruled by the court.

Nowhere is its inconsistency more clearly demonstrated than by Mr. Baxter himself, at pages 114 et seq. He shows that it must be half wrong. His only error is as to the half which is wrong. This part of his brief

is adapted from that which he filed in the Social Circle case. He there took the same legal position which he takes now. He claimed that, if he was correct, the decree must be reversed. This was true; but the decree was affirmed.

That controversy was between Augusta and Social Circle in Georgia.

Augusta there, as Montgomery here, was the long haul. Social Circle is 119 miles short of Augusta—Troy only 52 miles short of Montgomery. Augusta is as large and important as Montgomery—Social Circle small and unimportant compared with Troy. Augusta has better water competition than Montgomery—Social Circle is without the rail competition which Troy enjoys. Social Circle was in every way worse placed than Troy; but the court held that there was no substantial dissimilarity in circumstance or condition. The case is very fully set forth in the brief of the undersigned in the Ionia case, No. 539 of this term, (pp. 88 et seq.)

Montgomery 21883
Augusta 39300
Troy 9449
Social Circle 2681

STATEMENT OF FACTS.

As stated at the commencement of this brief, it is not the intention to make a complete *résumé* of the evidence, but instead to set forth quite fully the evidence of the most important witnesses upon certain points which, as the undersigned believes, are sufficient to dispose of the case.

In few cases is the maxim more applicable that witnesses should be weighed, not numbered.

The most expert evidence is that of the railroad men and steamboat men, and this will be set forth quite fully.

The tradesmen and other local witnesses of the various towns give evidence comparatively of much less importance; but Mr. Wiley of Troy and Mr. Vandiver of Montgomery appear by Poor's Manual to be directors in the Alabama Midland Company.

Although the facts are so well discussed by the Commission, the opinions of the learned judges below have been singularly meagre and inadequate. The questions between Troy and points on the Central of Georgia they hardly refer to at all.

It may be convenient first to define the "basing point system" so often referred to.

This is described as follows by Theodore Welch, the General Freight Agent of the southern portion of the Louisville & Nashville system (in answer to the general interrogatory, p. 191). He says (p. 276):

> In case freight is shipped from one competitive point *via* another competitive point to some local point on a railroad, the rule is to allow the railroad from the last competitive point its full local to destination. For instance, a package of freight from New York is shipped by any line to Greenville; the rate from New York to Greenville would be made up of the rate from New York to Montgomery *plus* the rate from Montgomery to Greenville; the Mobile & Montgomery Railroad, on which Greenville is located, would in such case be allowed its full local from Montgomery.

Mr. Welch had testified that in his opinion the rates from Montgomery to Troy were reasonable (p. 275). Answering a cross interrogatory (p. 213), he said (p. 280):

> I am basing my opinion upon the rates considered as local rates. The position taken by me in the

> direct examination is that the railroads operated between Montgomery and Troy are entitled to their local rates. * * * A shipment of a carload of freight from Louisville to Greenville would, in the sense that the word has been used, be through to Montgomery, but would not be considered a through shipment to Greenville in the sense that the rate per mile, Montgomery to Greenville, should not exceed the rate per mile, Louisville to Montgomery. It is a well established principle, especially in the southern States, that the road making a delivery to one of its local stations, as Montgomery to Greenville, is entitled to its full local. * * * In making rates from Louisville or other competitive points to Troy through Montgomery, Montgomery is regarded as what is known as a *basing point*, as are also Columbus and Union Springs, and the rate from Montgomery to Troy on business from Louisville is the same as the local rate from Montgomery to Troy.

Lee McLendon, division freight and passenger agent of the Alabama Midland line, says (p. 354):

> In the construction of rates to Troy from the West, Montgomery is regarded as a basing point.

COMPARISON BETWEEN TROY AND OTHER GEORGIA CENTRAL POINTS.

No evidence was submitted to the Commission by the railroad companies upon this branch of the case.

For some reason Troy is discriminated against, although not only Columbus and Eufaula with their Chattahoochee River connections, but Opelika (p. 64) also are given through rates; and even little Union Springs is a basing point (p. 281). The populations of these localities in

1880 and 1890 are as follows, according to the United States census:

	1880.	1890.
Troy	2,294	3,449
Eufaula	3,836	4,394
Opelika	3,245	3,703
Columbus	10,123	17,303
Union Springs	1,862	2,049
Montgomery	16,713	21855

The following comparisons are noticeable:

First, that population is not a vital poi[illegible] Eufaula and Opelika are but little larger than Troy, yet they have as good rates as Columbus, which is five times its size.

Second, that rail competition is not a vital point. Eufaula has none (the so-called Eufaula and Ozark Railway being a mere branch of the Georgia Central); yet it has as good rates as Columbus and incomparably better rates than Troy.

Third, that water competition is not a vital point. Opelika has as good rates as Eufaula or Columbus; yet it is not situated upon any stream, and it has only the same amount of rail competition as Troy.

Fourth, that possibilities of future development are not a vital factor. Troy increases in population much more rapidly than Eufaula or Opelika.

Mr. McCormick, a Eufaula merchant and one of the witnesses for the railroad company, testified as follows upon direct examination (pp. 204, 340):

> Q. State what difference, if any, exists between the circumstances and conditions affecting the trans-

portation of traffic to and from Eufaula, Ala., and the circumstances and conditions affecting the transportation of traffic to and from Troy, Ala.

A. *I do not see that there is much difference* between the circumstances and conditions affecting the rail transportation of traffic to and from the towns of Eufaula and Troy. Eufaula has only one line of railway, while Troy has two distinct lines. Eufaula has water advantages, while Troy has none. These water advantages, *while there is not much business now done by water*, enables us to get better railroad rates than we would otherwise have.

In other words, the restricted water competition at Eufaula (mainly effective in giving access by water to railroad lines crossing the river at other points) is regarded as a set-off to Troy's direct rail competition (p. 340):

The railroad lines coming into Eufaula are under one management or system, and therefore not competing, but the Chattahoochee River, on which Eufaula is situated, reaches numerous lines of competing railways, the names of which I can not at this time give.

The relative distances to Louisville, St. Louis, and Cincinnati by rail (the three points as to which rates on class goods to Troy, Columbus and Eufaula are contrasted) are as follows:

	Troy.	Columbus.	Eufaula.
Louisville	542	551	570
St. Louis	676	685	704
Cincinnati	629	638	657

The distances are given *via* Birmingham, Ala., the nearest rail route, except that Columbus is 29 miles nearer to Cincinnati *via* Atlanta.

Opelika is distant 28 miles from Columbus on the main line to Birmingham.

WATER COMMUNICATION FROM COLUMBUS AND EUFAULA.

Many interested persons, such as merchants of these two towns, give testimony from which it might be inferred that the Apalachicola and Chattahoochee Rivers constitute a magnificent waterway upon which a mighty commerce is ready at any moment to spring up. One or two of their soberer fellow citizens, and the persons whose occupations have led them to be more familiar with this waterway, draw much more modest conclusions.

In connection with this testimony we may examine the official reports of the War Department upon this subject, because the navigability of streams and harbors is a matter of public knowledge of which the courts take judicial notice. (*Pegrous* v. *Howard*, 7 Pet., 324, 342; *Lands* v. *A Cargo of Coal*, 4 Fed. Rep., 478; *The Peterhoff*, Blatchf. Prize Cas. 463, 521–2.) We shall refer to the report of the Chief of Engineers to the Secretary of War for the year 1896. For convenience, the relevant portions of this report have been printed by the War Department as the "Annual Report upon the Improvement of Rivers and Harbors in Western Georgia and Florida and in Eastern Alabama, in the charge of F. A. Mahan, Major, Corps of Engineers, U. S. A.; being Appendix O of the Annual Report of the Chief of Engineers for 1896."

(1) *Apalachicola Harbor.*

The amount and method of the commerce in this harbor is described as follows by the Chief of Engineers (p. iv):

> The commerce of the port is mainly in timber and stores. It was valued in 1886 at $2,666,882 and in 1896 at $3,611,822, an increase of $944,940. *These materials are taken in lighters from the shore to the anchorage grounds about 20 miles away.*

The witness most familiar with the facts was Mr. John E. Grady, produced by the district attorney, a merchant and collector of customs at Apalachicola, Florida, of which place he had been a resident for forty years. His testimony is more complimentary to the harbor than that of the Chattahoochee boatmen. He testifies as follows with regard to merchandise from northeastern cities (pp. 395–6):

> Goods destined for any of the points named would be brought to Apalachicola by river steamers and transferred to the vessels in the bay by barges towed by tugs or by lighters. The distance from Apalachicola to the different anchorages in the Bay of Apalachicola is from 4 to 20 miles. A barge towed by a steam tug can make the trip from one to four hours. Shipments from Mobile and New Orleans, generally brought by vessels of light draft, can be transferred alongside the river steamers at Apalachicola. Goods brought from or shipped to northeastern cities are generally brought by vessels drawing more water, have to be transferred by barge or lighter to the city, thence put on board river steamers, and the same way for goods shipped from Apalachicola to the points mentioned. Vessels

> drawing 12 feet of water can enter the Bay of Apalachicola through the west pass entrance and anchor within 4 miles from the city. Vessels drawing 7 feet of water can come alongside the wharf at Apalachicola. Vessels drawing 18½ feet of water can enter the Bay of Apalachicola through the east pass, a distance between 15 to 20 miles from the city.

The commerce of the city he describes as follows (p. 396):

> Steamers and sail vessels are now plying between Apalachicola, Fla., and Mobile, Ala. Sail vessels, and occasionally a steamer calls at Apalachicola for lumber and timber bound for northeastern cities, and very often bring merchandise for Apalachicola, but none for interior points to my knowledge. A steamer can make the trip from Apalachicola to Mobile and back in 6 days, a sailing vessel from 10 to 15 days, according to the weather. Steam vessels from Apalachicola to northeastern cities would require from 6 to 8 days; sailing vessels from 15 to 20 days, according to the weather.

Mr. Grady knew of no commerce from Eufaula, Columbus, or other points on the Chattahoochee River to Mobile, New Orleans, Louisville, Cincinnati, St. Louis, New York, or other eastern cities; and none from these cities to Eufaula or Columbus for 15 years past (pp. 392, 395).

W. R. Moore, agent of one of the Chattahoochee River steamboat lines, and a witness for the railroad companies, testified as follows on cross-examination (p. 320):

> Ocean or gulf steamers or vessels can not enter the harbor of Apalachicola. Freight carried on a river boat to Apalachicola, destined for Mobile or

> New Orleans or New York or other northeastern cities, or brought from those cities to Apalachicola, destined for Eufaula or Columbus, would have to be transferred at Apalachicola to or from the ocean or gulf steamer or vessel from or to the river boat. These transfers are made with barges towed out to said ocean or gulf vessels or from them to the river boat. Vessels not exceeding 5 or 6 feet of draft can enter the harbor at Apalachicola on a high tide. Such a vessel could make a trip to Mobile in two days. I do not know the time it would require such a vessel to make the trip to New Orleans or New York. There is a small steamer and a schooner now running between Apalachicola and Mobile, but none, so far as I know, running between Apalachicola and New Orleans or New York.

He further says (p. 321):

> According to my idea, there is no harbor at Apalachicola, because the bay is so filled up that there is not sufficient depth for vessels to enter it, except of very light draft. * * * The harbor at Apalachicola is used almost entirely for lumber.

He also says (p. 320):

> There is no through business from or to Columbus or Eufaula via Apalachicola from or to Mobile or New Orleans, or New York and other northeastern cities. I do not know of any shipments, and there are none, from Louisville, Cincinnati, and St. Louis via the Ohio and Mississippi rivers to New Orleans, and thence by Apalachicola to Eufaula or Columbus.

Mr. Joseph, general manager of one of the railway lines, confirmed Mr. Moore upon this last point, except that he said that there was a small through business on the river

to Mobile, New Orleans and eastern cities (p. 323). As to the harbor at Apalachicola, he says (p. 324):

> Gulf steamers or vessels cannot enter the harbor at Apalachicola. Freight carried by river boats to Apalachicola destined for Mobile or New Orleans or New York or other eastern cities, or brought to Apalachicola from those places in vessels, destined for Eufaula or Columbus, would have to be transferred at Apalachicola from one vessel to another. Such transfers are made in barges. Only very light vessels of about 5 feet draft can enter the harbor at Apalachicola. Such vessels that enter the harbor at Apalachicola might be able to make the trip to Mobile, but I do not think they could make the trip to New Orleans or New York from Apalachicola. * * * There is only about 6 feet of water in the inside harbor at Apalachicola. * * * The harbor at Apalachicola is used mainly for the lumber business, in fact, almost entirely.

This shows the valuelessness of the speculations of the Columbus and Eufaula merchants produced on behalf of the railroad companies. Careful analysis of their testimony (for which there is no space within the limits of this brief) shows either vagueness or ignorance of important conditions.

Evidently commerce by water *via* New Orleans must be in little vessels drawing not over 5 to 7 feet of water, or else must be subject to a long trip in lighters, in order to reach the river steamers.

(2) *Apalachicola River.*

This river, as stated by the Chief of Engineers, has a length of 105 miles and a depth of at least six feet. It is formed by the junction of the Chattahoochee and Flint

rivers (p. iv). It is 150 to 200 yards wide, but more or less obstructed by snags and logs in the river (p. 1347). The annual report from 1879 is quoted from as follows (p. 1348):

> The present commerce on this river is insignificant when compared with its former proportions. This diminution is due partly to railroad competition, but the shallow outlet at Apalachicola is the prime cause.

Some work was done during the following years, largely in cutting down overhanging trees and getting out snags, old piles, etc., and the condition of this magnificent channel of commerce on June 30, 1895, was described as follows (p. 1350):

> The channel was completely opened to navigation, except scattered logs and snags which caused trouble at low water. Overhanging timber and some sharp bends of the banks at the Elbows and Moccasin Slough, which retard boats at all stages of the river, remained to be removed.

(3) *Chattahoochee River.*

The distance from Columbus to Apalachicola by water is 360 miles, and from Eufaula to Apalachicola 275 miles (p. 319), of which the lower 105 miles, as above stated, are in the Apalachicola River, which is formed by the junction of the Chattahoochee and Flint. Not far from this junction, at 223 and 138 miles from Columbus and Eufaula, respectively, is Chattahoochee Junction (p. 319) or River Junction, at which the Louisville & Nashville line crosses the river, thus connecting it with the ports on the east coast of Florida.

The Chattahoochee River is described as follows by the Chief of Engineers (pp. v, vi):

> This river is not navigable above Columbus, Ga. It was originally much obstructed from Columbus to its junction with the Flint, 224 miles, by logs, snags and overhanging trees, and by a number of rock and marl shoals. Navigation was difficult and dangerous by day, and impossible by night. * * * The channel below Eufaula is nearly clear of obstructions, and boats drawing 3½ feet have little trouble in navigating the river. Difficulty is still had at St. Francis Bend, five miles above Eufaula, and Hospital Reach, Woolfolk Bar, and Old Head of Uchee, all within 20 miles of Columbus. * * * The annual accumulation of logs and snags is scatscattered over the length of the river and makes low water navigation dangerous.

Navigation here also suffers by reason of "overhanging trees from the banks" (p. 1357).

The river commerce is described by Mr. Joseph, general manager of the Columbus & Gulf Navigation Co., as follows (pp. 321–2):

> There is at present only three steamboats running between Columbus, Eufaula, and Apalachicola, viz: The "Naid," tonnage of 150; "Flint," about 150 tons, perhaps a little more, and the "Bay City," with a tonnage of about 130 tons. The average time required for a boat to go from Columbus to Apalachicola and return is about 5 or 6 days in ordinarily high water, and in low water it takes 7 days or more. The Chattahoochee River is navigable by steamboats between Columbus, Eufaula, and Apalachicola *for six months or more in the year by*

ordinary river steamboats, and during the summer months it is navigable by small boats and barges.

Mr. W. R. Moore, another steamboat agent at Columbus, testifies similarly, except that he claims the river to be navigable "for steamboats" all the year (pp. 317–18). He gives the time of the return trip from Eufaula to Apalachicola at four days. Both witnesses state that the main business is local, Mr. Joseph giving the number of landings at "about 75" while Mr. Moore gives them at "about 164" (pp. 323, 319).

These witnesses, as above shown, have little or no knowledge of any through business. Their testimony is much more valuable on this point, being witnesses for the railroad companies and having a most intimate knowledge of the business, than that of the Columbus and Eufaula merchants. Some of the merchants, also, refused to testify to the existence of any present ocean or gulf commerce by way of Apalachicola. Mr. McCormick of Eufaula says that "practically no business is done between Eufaula and Mobile or New Orleans" (p. 339).

Mr. Dent of Eufaula, who had been in business since 1868, had never received any shipment by river *via* Apalachicola from northeastern cities (p. 343).

Mr. Edmonson of Eufaula had never received but one such shipment, which came from Baltimore and was about 23 years prior to his testimony (p. 347).

(4) *Effect of competition by Apalachicola.*

It is a safe conclusion from this testimony that (while, of course, competition *via* Apalachicola would come into

play if the railroad rates were made sufficiently high) the possible Apalachicola route cuts no figure in the establishment of the present rates; and whatever assistance is given to Eufaula and Columbus by the river in regulating freight rates, comes from the joint rail and water route from Jacksonville and eastern Florida points *via* Chattahoochee Junction. This is the testimony of Mr. Edmonson of Eufaula, who says (p. 351):

> I can not say that I have any data upon which I can estimate with certainty the possible effect water competition by the river between Eufaula and Apalachicola and thence by water to Mobile, New Orleans and northeastern cities and Ohio River points, has on rail rates between Eufaula and these points. I can not say that this water competition has at any time controlled and actually fixed these rail rates within my knowledge; but I do know that the water route to Chattahoochee Junction has had the effect of controlling and fixing rail rates.

It may be remarked that so far as Eufaula is concerned, this gives advantages little superior to those of Troy; for Eufaula has no local railroad competition, and the joint water and rail routes are slow and circuitous; while Troy has the benefit of competition between the Alabama Midland and the Central of Georgia.

The following extracts from the testimony of W. R. Moore, agent for "the boat lines in Columbus, Ga." (p. 321), are of interest in this connection (pp. 175, 318):

> Q. What effect, if any, does the fact that the Chattahoochee River is navigable for steamboats between Columbus and Apalachicola have upon the rates charged by railroads between Columbus and

Eufaula and Mobile, [New Orleans and eastern cities]?

A. The fact that the Chattahoochee River is navigable by steamboats between Columbus and Apalachicola does not, I think, have any effect upon the rates charged by railroads between Columbus and Eufaula and Mobile [New Orleans and eastern cities]. At certain seasons of the year, on account of the low stage of the water in the river, the boats would be unable to do the business from the east, and steamers could not get up to anchorage in the bay at Apalachicola on account of the condition of this bay.

Q. Are the rates which are now charged between Columbus, Eufaula and Mobile [and New Orleans] higher or lower than they formerly were? If you say that they are lower now than formerly, state if you can when the various reductions were made and what were the causes of those reductions.

A. The rail rates now charged by railroads between Columbus and Eufaula and Mobile [and New Orleans] are lower than they formerly were. Said rates have been declining since 1870. *On account of vessels being able to land right at the dock at Savannah, it enables them to put their goods through at a much less rate, as there is not so much handling to be done.* In former years western freight went down the Mississippi River to New Orleans, and from there to Apalachicola, and from Apalachicola to Columbus and Eufaula, whereas they now come direct by rail, and consequently require *much less expense in handling.*

Q. Suppose the rail rates on cotton from Columbus and Eufaula to New Orleans should be increased 18 cents per 100 lbs., what effect, if any, would it have towards inducing the shipment of such cotton and of other freight by river to Apalachicola and thence by vessel to New Orleans?

A. If the rail rates on cotton from Eufaula and Columbus to New Orleans should be increased 18 cents per 100 lbs., the effect, in my opinion, would be to have *the tendency to* again open up the shipment of cotton by river to Apalachicola and thence by vessel to New Orleans and eastern points.

This last question was suggested by the fact that the present rate on cotton from Troy to New Orleans is 68 cents, whereas from Columbus to New Orleans it is 50 cents; and that the Interstate Commerce Commission have directed that the Troy rate be reduced to the Columbus figure. Witness commits himself to nothing beyond a "tendency."

The next interrogatory asked what would be the result of increasing the rates on class goods from the northwest to Columbus and Eufaula so as to make them equal to the rates from other points to Troy (pp. 175–6). The witness answered as follows (p. 318):

If the rail rates from Cincinnati, Louisville and St. Louis to Columbus and Eufaula were increased over those now in effect as specified in this interrogatory, the effect would be to have *a tendency to* open up the shipment of freight via the Ohio and Mississippi Rivers from those points to New Orleans, and thence by vessel to Apalachicola and by steamboat from Apalachicola to Eufaula and Columbus.

It is the opinion of Mr. Moore, as shown by his two following answers, that the present water rates *via* the Chattahoochee river are as low as they can be got (pp. 318–19):

A. If steamboats could obtain full cargoes of freight during the entire season of navigation on every trip,

> going and returning between Columbus, Eufaula and Apalachicola, the lowest rate per 100 lbs. at which they could afford to carry freight between Columbus and Eufaula would be 35.4 on first-class and so on down.
>
> A. The rates now usually charged by steamboats between Columbus and Apalachicola on the different classes of freight referred to in the ninth interrogatory are as follows: On first class 35.4 per 100 lbs. [etc.].

Witness testified, however, that at these rates, if the volume of traffic be sufficient, "any amount of tonnage necessary could be obtained for traffic on the Chattahoochee River" (p. 319).

Being asked upon cross-examination as follows as to the assumption "that steamboats could obtain full cargoes of freight during the entire season of navigation on every trip" (p. 216):

> Q. Has that state of things ever existed within your knowledge? Is it probable that it will ever exist?

Mr. Moore answered as follows (p. 321):

> There has been a time within my knowledge when steamers could obtain full cargoes of freight during certain seasons of navigation on every trip going and returning between Columbus, Eufaula and Apalachicola, but none during the entire season of navigation. I do not think it probable for such a state of boat traffic to ever exist during the entire season of navigation.

Mr. Joseph, manager of the Columbus & Gulf Navigation Company, was unable to answer the first question above quoted as put to Mr. Moore. Answering the next

question, he stated that the rates are lower than formerly, but that no shipments are being made, and that he is unable to state the cause of the reductions. The next two questions he answered as follows (p. 222):

> A. If the rail rates on cotton from Columbus and Eufaula to New Orleans should be increased 18 cents per 100 lbs., *it would not have any effect* towards inducing shipment of cotton or other freight by river to Apalachicola, thence by vessel to New Orleans, *because this route is an impracticable one*, there being other routes more convenient.
>
> A. If the rail rates from Louisville, Cincinnati, and St. Louis to Columbus and Eufaula should be increased over those now in effect as specified in this interrogatory, *I do not think it would have any effect* towards inducing shipments of freight via the Ohio and Mississippi Rivers to New Orleans, and thence by vessel to Apalachicola and by steamboat to Columbus and Eufaula.

Mr. Joseph testified that he thought that "if steamboats could obtain full cargoes of freight during the entire season of navigation on every trip going and returning," they could afford to carry freight at rates 20 per cent. less than the present ones (p. 322); but upon cross-examination, he said (p. 325):

> Within my knowledge there never was a time when steamboats could obtain full cargoes during the entire season of navigation on every trip going and returning from Columbus, Eufaula and Apalachicola, nor a time when the river rates were 20 per cent. lower than they are now. I know of no reason to think that it is probable that such a condition of affairs will ever exist.

These thoroughly expert witnesses confirm the testimony of Mr. Oliver C. Wiley, the Troy manufacturer, who had formerly been President of the Alabama Midland Railway Co. (p. 255). Mr. Wiley testified as follows (pp. 164, 253):

> Q. Is there any material difference between the circumstances and conditions affecting the transportation of traffic to and from Eufaula, Columbus and Opelika on the one hand, and Troy on the other? If so, what? * * *
>
> A. I know of no material difference affecting the transportation of traffic to and from Troy on the one hand and Eufaula, Columbus and Opelika on the other. Eufaula and Columbus are both river towns, but no goods are shipped from the west *via* the Chattahoochee River.

DISCRIMINATION IN FAVOR OF COLUMBUS, EUFAULA AND OPELIKA.

The figures are well stated in the able opinion of Mr. Commissioner Clements. The discrimination which is especially of interest here is, first, upon "class goods" brought in from northwestern points, and second, upon cotton shipped to New Orleans.

(1) *Class goods.*—These goods are "shipped from Louisville, Ky., St. Louis, Mo., or Cincinnati, Ohio." The rates are the same to Eufaula and Opelika as to Columbus. Columbus is a "basing point" as against Troy. It is evident, however, that no such goods could be shipped *via* Columbus to Troy, because the rates by the shorter route via Montgomery are so much lower (see

tables at p. 61). Under the "basing point system" the goods come through *via* Birmingham, Ala., and the Louisville & Nashville Railroad, to Montgomery, upon through rates which are very low per ton per mile. The full local rate is then added, so that from Montgomery to Troy, and even for the whole distance from northwestern points to Troy, there is a very high rate per ton per mile.

The effect of this is to throw Troy altogether out of competition with neighboring points even as a distributing center to the territory immediately surrounding it; and to distribute its natural mercantile profits, not simply between comparatively large places like Montgomery and Columbus, but among such small places also as Eufaula, which differs little from Troy in size, which has no effective all-water competition, which has no all-rail competition, and whose strategic advantages, if any really exist apart from official favoritism, consist in certain part rail and part water routes, *via* the Chattahoochee River and railroads crossing that river at other points.

The distance from Birmingham to Troy *via* Columbus, following the Central of Georgia all the way, is 242 miles. The distance from Birmingham to Eufaula, similarly estimated, is 251 miles. The distance from Birmingham to Columbus, and thence by water to Eufaula, is 242 miles. The distance from Birmingham *via* Montgomery to Troy and Eufaula are 148 and 176 miles respectively.

The question presented to the Interstate Commerce Commission was whether the differences in strategic situation between Eufaula and Troy justified these or any lesser discriminations in rates. It will be noticed that

the rates to Troy are on a majority of the classes of goods between $\frac{1}{3}$ and $\frac{1}{2}$ higher than those to Eufaula (p. 61).

Comparison is also made as between Troy and Opelika, a place which has no competition by water, and rail competition only from two companies; and which is 129 miles distant by rail from Birmingham, as against a distance of 148 miles between Birmingham and Troy.

This equality seems to have been conceded to Opelika by the railroad companies as a result of the contest made by that town before the Interstate Commerce Commission in 1887, which resulted in the interesting opinion of Commissioner Walker in *Harwell* v. *Columbus & Western R. R. Co.*, 1 Int. C. C. 236; an opinion which clearly describes the "basing point system" in the southern States, and is subject to criticism only in that it repeats what the undersigned believes to have been the fundamental error of the Commission in misinterpreting the long and short haul clause. While the petition of Opelika as to these class goods was not then granted, the town has since somehow got the rates which it desired.

The Interstate Commerce Commission, after a very full discussion of this case, say (p. 65):

> Columbus and Eufaula are located in or are contiguous to the territory in which Troy is situated, and the former at least is in active competition with Troy for business in the country immediately around Troy. We are of the opinion that the class rates to Troy from Louisville, Cincinnati and St. Louis should be at least as low as those above given to Columbus and Eufaula—

and, it must be added, to Opelika.

(2) *Cotton.*—The rate from Montgomery to New Orleans for cotton is 45 cents. The rate from Troy is made up by adding to this the local between Montgomery and Troy, thus making the total 68 cents. This is a prohibitory, not a revenue, tariff. The result of it is that no cotton is shipped from Troy to New Orleans, either now (pp. 332, 355) or for at least seven years past (p. 233), since the rate to Savannah from Troy is 47 cents. The cotton growers in the vicinity of Troy thus lose the benefit of the increased price at Liverpool of cotton shipped from New Orleans (pp. 59, 156).

The consequence is that cotton brings less at Troy than at Montgomery, although Troy is 52 miles nearer to the Atlantic seaboard, because Montgomery is given the same rate to New Orleans as to Savannah; and yet it does not appear that Montgomery cotton is any better intrinsically than Troy cotton. Troy is almost equidistant between Savannah and New Orleans (359 and 372 miles, respectively). Montgomery, which gets as cheap a rate to Savannah as to New Orleans, is much less centrally located (411 and 320 miles, respectively. These distances to Savannah are *via* the Alabama Midland. The distances are a little shorter *via* the "Savannah Short Line," which is not a party to these proceedings. The distance from Montgomery by this line is 340 miles; from Troy, by this line and the Central of Georgia, 313 miles.) Yet Troy does not lay claim to as good rates as Montgomery in this particular. It merely objects that the rate of 68 cents to New Orleans, as against Montgomery's 45 cent rate, is excessive and unreasonable; and it bases

its claim not upon § 1 but upon § 3, asserting that there is undue discrimination in favor of Columbus as well as of Montgomery.

The distance from Troy to New Orleans, as above stated, is 372 miles. The distance from Columbus to New Orleans is 414 miles.

A mileage rate from Troy to New Orleans based on the mileage rate from Montgomery to New Orleans would give a rate on cotton from Troy to New Orleans of 52.21 cents. The Commission, however, gave Troy a rate of 50 cents for the following reasons (p. 61):

> As a general rule, however, while the aggregate through rate steadily increases as the distance increases, the rate per ton or hundredweight per mile decreases. Under this rule, the distance from Troy being 52 miles greater than from Montgomery, the rate per 100 lbs. per mile from Troy, in the absence of exceptional conditions, should be slightly less than that from Montgomery. In view of this rule, and of the rate of 50 cents from Columbus, a longer distance point by 42 miles than Troy, our conclusion is that the through rate on cotton from Troy *via* Montgomery to New Orleans should not exceed 50 cents per hundred pounds.

The object of the railroad companies in making these prohibitory rates upon cotton from Troy is very clear. It is to force all of the cotton to go eastward to Savannah, although naturally, the difference in distance being only 13 miles, part of it would go to New Orleans in order to get the better prices there. Upon cotton going to New Orleans, however, the Plant system, (to which the Alabama Midland belongs,) or the Central of Georgia, as

the case might be, would only make its proportion of the through rate from Troy to New Orleans; while it gets the whole compensation for hauling the cotton from Troy to Savannah, or (in the case of the Plant system), Charleston, Brunswick or Jacksonville.

COMPARISON OF TROY WITH MONTGOMERY.

A large mass of testimony upon this point was produced after the case came into court. It is discussed at length by Mr. Shaver in his brief upon the present appeal. The testimony produced before the Commission was confined to the affidavit set forth at pp. 158–9.

Montgomery is a much larger place than Troy, but that is clearly no ground for taking it out of the operation of the long and short haul clause, as was indeed admitted by the learned counsel for the railroad companies at the Court of Appeals (Supplementary Brief, p. 6):

> In this case the defendants do not pretend to offer the slightest justification for charging less for a longer than for a shorter distance, except the solitary fact of competition at the longer distance point. If the fact of competition cannot be legally considered at all, this case must necessarily be decided against the defendants so far as the long and short haul question is concerned.

The learned counsel's comparison of Montgomery and Troy is adapted from the comparison which he made in a former case between Augusta and Social Circle, but "circumstances and conditions" render him unable to make the contrast as strong here as it was there.

No great weight is placed upon rail competition. Troy has that. It has the benefit of the first eight lines mentioned on page 122 of Mr. Baxter's brief.

Defendant's case substantially rests upon the alleged probability of effective water competition *via* the Alabama River to Mobile. A large number of witnesses—railroad officials, steamboat men and business managers—is produced to the effect that *if Montgomery and Troy were equalized by raising the Montgomery rates to the present Troy figures*, water competition would spring up which, even if the other railroads also raised their rates, would destroy the Alabama Midland through business. These opinions were mainly based upon alleged experience during a controversy between the Montgomery merchants and the railroad companies, when the merchants ran a line of steamers to Mobile. The opinions are not, however, backed up by actual figures, and we are not given the information necessary to verify the wisdom of these opinions by actual computation. This omission is not due to any lack of insistence on the part of the District Attorney. He filed the following cross-interrogatory to the Montgomery witnesses (p. 218):

> Q. Have you any *data* upon which you base any estimate you may give of the effect of an advance in rail rates such as is inquired about in the direct interrogatories propounded to you in inducing shipments from New York and the northeast by ocean to Mobile and thence by river to Montgomery, and in inducing shipments from Louisville, Cincinnati and St. Louis to Mobile, and thence by river to Montgomery? If you have such *data*, give it.

The answers of the witnesses to this cross interrogatory will be found at pp. 284–5, 293–4, 223, 288, 296, 300, 308, 303 and 305 respectively. Among all these answers the only actual figure given is by Mr. W. F. Vandiver, a Montgomery grocer, as follows (pp. 293–4):

> In 1886, when there was a steamship line between New York and Mobile, the rate through to Montgomery on first class was 55 cents a 100 against an all-rail rate of $1.14. This being possible and highly probable, I can not see why the rate should be higher than 55 cents through to Montgomery *via* the water route; that is, steamships from Boston and New York to Mobile, and by our line of steamers to Montgomery, which was the old rate established by the old steamship line in 1886. Should this company be established, and the old rates reestablished, the rail lines would have to largely reduce their present rate, or the business would go to Montgomery entirely by the water route.

If this rate of 55 cents from New York to Montgomery was normal, it would be significant. It was evidently abnormal, because the merchants' war only lasted two years (p. 289), and the rate from New York to Montgomery is still $1.14. If the steamers could ship first class goods through at a profit for any such sum as 55 cents, the all-rail rate of $1.14 could not be maintained. The 55-cent rate was evidently the result of a "rate war," unremunerative and of no possible permanence.

We may therefore dismiss all this speculative evidence from consideration as too vague, and because the expert witnesses failed to back up their assertions with proof. Even as against the $1.14 rate, the through business does

not pay, and the river steamers are practically confined to local traffic (p. 223). Goods sent by river have to be insured at an advance of ¼ to ⅜ per cent. (p. 302). Not more than four small steamers run at any time, and while "the Alabama River is navigable every month in the year by steamboat between Montgomery and Mobile," nevertheless "for two months in the year it is navigable only by very light-draft boats and barges" (p. 220). The distance by river is 400 miles from Montgomery to Mobile, while by rail it is only 180 miles (p. 222). The time when the river is low is when the cotton crop is moving, so that the steamboats "are unable to carry any through cotton from Montgomery (p. 292). The Chief of Engineers in the report above referred to states that it is navigable for ten months, but that "during the remaining two months the depth of water on the bars between Montgomery and Selma prevented vessels from passing" (p. ix).

THROUGH AND LOCAL RATES.

(1) The distinction between the "through rate" from Louisville to Montgomery and the "local rate" from Montgomery to Troy is not based upon the assumption that there was to be a transshipment at Montgomery.

J. B. Corcoran, who had been an agent for the Alabama Midland Railroad at Troy for seven years at the time of testifying, says with reference to class goods shipped from western points to Troy via Montgomery (p. 233):

> Generally there is no transfer of such goods at Montgomery from the cars in which they are brought

to that city to the cars on the Alabama Midland and Georgia Central companies unless the shipment is less than a carload; although the agent, when he has time and cars, may transfer carload lots for the purpose of saving mileage.

On cross-examination he states that this testimony (p. 234)—

> Is based upon observation and experience in the line of my duties as agent, because, if such transfer was made at Montgomery, it would be shown by the freight bill, and these freight bills, as a general thing, do not show that such transfers have been made at Montgomery, but indicate that the cars have come through.

J. W. Nall, agent for the Central of Georgia at Troy, says of class goods similarly shipped (p. 245):

> Occasionally such freight is transferred from car to car at Montgomery, but frequently we get it in through cars.

Theodore Welch, general freight agent at Montgomery of the Louisville & Nashville system, which connects them with the roads above mentioned, says (p. 280):

> The freight would go through to Troy in the same cars in which it is brought to Montgomery; at least this is the general rule. Less than carload shipments destined to Troy would doubtless be transferred at Montgomery.

W. J. Haylow, master of transportation of the Alabama Midland, says of these shipments (p. 270):

> Some of the cars in which the goods are shipped go through to Troy, and sometimes goods are transferred at Montgomery to cars on the roads of the

> Alabama Midland and Georgia Central companies. The goods are not transferred from car to car at Montgomery unless the through car is rejected on inspection on account of bodily defects.

J. E. Henderson, a Troy merchant, says of class goods (p. 262):

> I can state of my own knowledge that there is no transfer of such goods at Montgomery from the cars in which they are brought to that city to the cars on the roads of the Alabama Midland and Georgia Central Companies.

Oliver C. Wiley, a Troy manufacturer and former president of the Alabama Midland, says (pp. 251–2):

> There is no transfer of such freight at Montgomery from the cars in which it is brought to that city to the cars of the Georgia Central or Alabama Midland railroads, unless the other car should be disabled.

Charles Henderson, a Troy merchant, says (p. 230):

> I am able to state of my own personal knowledge that such goods are received at Troy in the same cars in which they were loaded at the initial point, and they simply transfer the car at Montgomery.

W. F. Shellman, traffic manager of the Central of Georgia system, says of similar goods shipped by that system from western points *via* Montgomery and Troy that they "are sometimes sent through in the original cars, and at other times transferred in route."

The same rules hold as to shipments of cotton from Troy *via* Montgomery to New Orleans. These ship-

ments go *via* the Louisville & Nashville Railroad, and Mr. Welch, representing that railroad, says (p. 281):

> When cotton is shipped via Montgomery through New Orleans from Troy, it goes through in the same cars as a general thing.

Mr. Haylow says of cotton (p. 271):

> When cotton is shipped from Troy via Montgomery to New Orleans whether or not it is transferred at Montgomery from the cars in which it was shipped at Troy to cars on the lines of the L. & N. R. R. depends on whether it is shipped in carload lots or less than carload lots. It is transferred from car to car when in less than carload lots, and when the cars are rejected on inspection also.

Bradford Dunham, superintendent of the Alabama Midland, says vaguely of both cotton and class goods, on cross-examination, that they are "sometimes" transferred (pp. 273–274). Lee McLendon of the same line is similarly guarded (p. 353).

(2) No attempt is made to show that the terminal expenses are any less at Montgomery than at Troy in proportion to the traffic. Such a calculation would be very difficult (Theodore Welch, p. 280; Lee McLendon, pp. 353–4). Probably there is no difference (Bradford Dunham, p. 273).

The expenses of transferring at a junction point are but slight in the case of carload lots. Nor can it be great when the goods, being less than carload lots, are transferred from car to car, as the cars can be brought up along-

side. Testifying as to these transfers, Mr. Shellman of the Central of Georgia said (p. 331):

> I have no means at this time of reducing the extra expense at Montgomery on these shipments to figures. Can only say in a general way that in cases where cars are sent through Montgomery to destination we have the expense of shipping them between the L. & N. and Central roads, and in cases where the freight is transferred from car to car in addition to the expense of switching there is the expense of transferring them by hand. I am not prepared to state what such expense amounts to per 100 lbs. or per car.

(3) Local freights are not a measure of the reasonableness of through freights over the same line of road. It will be noticed that in measuring through freights by local freights the railroad companies are violating the principles of the Texas Pacific case upon which they so much rely. Their own witnesses confute them.

Bradford Dunham of the Alabama Midland says (p. 273):

> The cost of handling local freight is much greater than of handling through freight per ton per mile.

Theodore Welch of the Louisville & Nashville system says (p. 280):

> The cost of handling local freight is greater than the cost of handling through freight per ton per mile.

Lee McLendon of the Alabama Midland testifies to the same effect (p. 354).

Mr. Shellman of the Central of Georgia, who had testified that the proportions of through rates received by

the Alabama & Midland and the Georgia Central line between Montgomery and Troy were reasonable, explains his testimony as follows (p. 331):

> They are based on the local rates of the Alabama Midland Ry., which is the short line between Montgomery and Troy, the long line accepting the same proportions. In speaking of these rates as reasonable in my answer to the direct interrogatories, I did so with reference to this fact. There is some difference in the expense of handling local freight and of handling through freight, the expense of handling local freight being greater than the expense of handling through freight per ton per mile.

He claims that these shipments "could not properly be called through freight" because they "would be handled by local trains." This seems to be a mere quibble, based on unsubstantial distinctions contrary to the ordinary usages of speech among railroad men.

The Alabama Railroad Commission does not (pp. 281, 331-2) and can not fix rates on interstate through freights. Its rates are on local freights and are therefore presumptively much too high for through freights.

PECUNIARY INJURY TO TROY.

The opinion of the Commission clearly explains the injuries suffered by Troy through these rates. They cut the Troy merchants off from supplying goods to the surrounding villages. Thus "first class goods" shipped from Louisville to be consumed in the little town of Brundidge, 17 miles east of Troy, pay 146 cents freight if supplied by a wholesaler at Montgomery, and 168 cents if supplied by a wholesaler at Troy (p. 62).

EFFECT UPON RAILROAD COMPANIES OF COMPLIANCE WITH THE COMMISSION'S ORDERS.

If the railroad companies should raise their rates sufficiently to Montgomery, Columbus, etc., there would be no discrimination against Troy; and unless the various localities could show that the rates were unreasonable *per se* under § 1, there would be an end to this controversy. The Commission, however, have not directed that the rates at Columbus, etc., be raised, but that the rates at Troy be reduced.

What would be the effect on the railroad companies of this reduction?

The Central of Georgia makes no complaint of any evil effect to come, and therefore we may presume that it would not be harmful to that company.

The Alabama Midland road, however, pleads poverty, and gives us to understand that so vast a revolution of its present system and reduction of its rates would involve its financial ruin.

How vast would this revolution and reduction really be?

An examination of the figures shows that the reduction in net profits would be slight; but that the reduction of the appellee's argument is *ad absurdum*.

The Alabama Midland road was sufficiently fortunate (for the purposes of appeals to the sympathy of the court in this suit) to have made a deficit of operating expenses over gross earnings of $77,564.57 in the fiscal year 1893. These figures are given in the deposition of Mr. McLendon, a young man in its office at Montgomery. It is somewhat significant that this information was elicited

by an interrogatory filed August 16, 1894 (p. 206), and answered apparently on or not long previously to January 21, 1895 (p. 240); yet that no question was asked by appellees, and no answer given by the witness, with reference to the earnings of the road for the fiscal year 1894, as to which (as well as the net earnings for the previous fiscal years) this court must remain without information, unless it is permissible to consult Poor's Manual.

Our lack of information from the record upon this point is not due to lack of inquiry on the part of the district attorney. If the witness was really the proper person for appellees to produce upon this subject, there can be no doubt that he could have obtained the necessary information had he cared to do so. The question and answer on this point are as follows (pp. 214, 354–5):

> Q. Give similar statements of amounts of revenue as are above enquired about for the fiscal years from July, 1891, to June, 1892, and from July, 1893, to June, 1894?
>
> A. I have not the information *at hand* necessary for me to give similar statements of amounts of revenue as above testified about for the fiscal years, July, 1891, to June, 1892, and from July, 1893, to June, 1894.

If a deficit of $77,564.57 is intended to be taken as the normal result of the railroad's operations, we are led to the conclusion that there must be a speedy foreclosure and sale of the road, resulting in a smaller capitalization. As no application has been made for the substitution of

any receiver as party defendant in the present suit, it is perhaps fairly presumable that the figures for the fiscal year 1893 were abnormal.

Assuming them, however, to be normal, and assuming that Mr. Plant and the other owners of the road are running it from a public spirited desire to benefit this section of Alabama to the extent which their purses will allow, how much is the loss which the railroad would immediately suffer by complying with the requirements of the long and short haul clause of the Interstate Commerce Law? The precise amount which it would lose upon *all* traffic from the east, as measured by the experience of the fiscal year 1893, is shown by Mr. McLendon, to be $87,448.82. Such a reduction would reduce the gross earnings of the road for that year from $490,767.77 to $483,318.95. It would increase the deficit from $77,564.57 to $85,013.39. But the railroad is not required to comply with the statute as to *all* traffic from the East, and the actual loss under the Commission's order is not given us.

Mr. McLendon furnishes us no figures from which we may infer the result of giving fair treatment to Troy in relation to goods shipped to and from the west. The extent to which his figures go, when considered in connection with the extent to which they do not go, affords an interesting subject for speculation. It may, however, be gathered that the loss would be small, even in comparison with the figures last considered. The entire competitive traffic of the road, according to Mr. McLendon, is $152,862.33, while the competitive traffic from eastern

points to Montgomery is $127,032.31, leaving only $25,830.01 for all competitive traffic, eastward and westward, not belonging to the single subdivision just mentioned (p. 352).

The Alabama Midland road is a part of the Plant system, which includes a large number of other roads in Georgia and Florida, and one road running up to Charleston, as well as certain connecting steamship lines. The Midland is doubtless operated as a part of a whole, and Mr. Plant pays little heed to the deficit upon any one arm of his octopus, provided he gets a comfortable profit from the whole of it. We are not given sufficient information as to the division of rates between the Alabama Midland and other railroads in the Plant system to enable us to judge whether its profits fairly represent its share of the work, or whether, as not infrequently occurs, part are going into some other treasury.

And in view of the defects in the direct examination of McLendon, and his failure to answer the cross-interrogatory above quoted, it is submitted that the whole testimony as to poverty of this railroad should be thrown out.

ARGUMENT.

If the construction placed by the undersigned upon the statute is correct, its application to the facts of the case is very simple. This court has full appellate jurisdiction over the decree of the Circuit Court. The Circuit Court, however, is not charged with any duty of reviewing the Interstate Commerce Commission, but with the specific duty of discovering whether or not this order was "lawful."

Before taking up the provisions of the order *seriatim*, a few premises may be made:

First: Congress is entitled to have its experiment fairly tried, irrespective of the wisdom of the experiment. The statute was within its constitutional power. It came to the conclusion that, whether from insufficient ability, or perhaps insufficient respectability, railroad directors as a class were not fit to be trusted with the final power of making rates. It believed that their rates operated to foster special interests (generally their own), and prejudice the main body of the public which supports the roads, as well as the bondholders who built them, and in many cases even the stockholders as well.

Various solutions of the problem were proposed. Some were for Government ownership. Others were for a complete system of Government control. Congress finally settled upon a conservative supervisory system, intended to correct rates which were extortionate or discriminatory. The whole value of such a system lies in the wisdom of the persons who are to administer it, and the rapidity and effectiveness of their work. The administration of this system is confided to the Interstate Commerce Commission; their decision to be upon some points final, upon other points subject to review by the court. It may be that we are mistaken in believing that a body of experts like the Commission is more competent to administer such an act than any judge or court whose time is mainly taken up with other business. Whether this opinion be mistaken or not, it is evident that Congress concurred in it.

So far the railroads have succeeded in preventing a

fair trial of the system. It is respectfully submitted that it is entitled to a fair trial; that if a fair trial shall divulge the fact that Government supervision, even to this very limited extent, is impracticable, cessation of attempts at such supervision will the more speedily occur; and that if the railroads succeed in keeping powerless the Commission which administers the present law, Congress will be obliged, however reluctantly, to enact a more rigid law, and will do so. It is believed, however, that if the second, third and fourth sections be administered by the courts, in their *quasi*-appellate jurisdiction over the Commission, according to their meaning and intent as clearly shown (in the case of the only ambiguous phrase therein contained) by the settled construction of the English statute from which the second section was taken—and if the railroads be not suffered to continue their present plan of putting in "dummy" defenses before the Commission and trying their causes *de novo* in the Circuit Court—the law will prove to be fair, wise and beneficial to the railroads as well as to the public.

Second: That the question apparently considered by the learned Circuit Court of Appeals, whether the officers of Southern Railroad & Traffic Association "are incompetent or under the bias of any personal preference for Montgomery or prejudice against Troy," is altogether immaterial. It was unnecessary for the Interstate Commerce Commission to inquire into this question, or for the United States Attorney to introduce any evidence upon it. The remark of that learned court that "the carriers are better qualified to adjust such matters than

any court or board of public administration" is a judicial *dictum* upon a legislative question.

Third: That the burden of proof was before the Circuit Court, and is before this court, very strongly upon the railroad companies. They are bound to show, not simply that the Commission's order was unwise or indiscreet, but that it was not "lawful."

Fourth. That the wealth or poverty of the railroad company has no relevance to the question of discrimination, although it would be doubtless relevant to the question whether or not the rate was reasonable under § 1. However embarrassed a railroad may be, and however much it may need money, it must be fair both as between individuals and as between localities. We repeat this on account of the pleas which have been made on behalf of the Alabama Midland road; but the imposition of fair rates would be but a trifling expense even to that road, and we are without information as to whether it is really a paying or non-paying member of the "Plant system" of which it is a component part.

Taking up now the various requirements of the Commission, they may be treated very briefly.

(1.)

On class goods shipped from Louisville [etc.] to Troy aforesaid, no higher rate of charge than is now charged and collected on such shipments to Columbus, Ga., and Eufaula, Ala. [and Opelika, Ala.].

The simple question thus raised is, whether the preference given to the places last named is "undue" or

"unreasonable." No question of power in the Commission is involved. It is simply to weigh the facts. Are the lesser distance and the rail competition at Troy overbalanced by such competition as exists at Eufaula? Is the slightly greater distance from Troy than from Opelika (the rail competition being the same) sufficient to justify the existing discrimination? These are eminently questions for the decision of the Commission. Judge Bruce says little upon them. Judge McCormick says nothing. It is respectfully submitted that, whatever may be the opinion of the court as to the wisdom or unwisdom of the Commission's action, there is nothing to say in support of the action of the courts in this suit.

(2.)

On shipments of cotton from Troy aforesaid through Montgomery, Ala., to New Orleans, La., no higher rate of charge than 50 cents per hundred pounds.

This rate is fixed in comparison with Columbus. The same argument that sustains the first clause of the Commission's order sustains this clause also.

Examination of any railroad map will show that Columbus, while 42 miles further off than Troy, has no better means of communication with New Orleans. It can not communicate advantageously through Montgomery except *via* the Central of Georgia. Troy has the same opening and has the Alabama Midland as well. The river is so low during the cotton season as to offer no practical assistance. It will be remembered that the worst part is above Eufaula. The all-water route *via* Apalachicola is impracticable for the further reason that

harbor there is not deep enough for a large business; and the part-water route *via* Chattahoochee Junction would simply put the goods into the hands of the Louisville & Nashville road, which carries the shipments sent *via* Montgomery.

(3, 4.)

On shipments of cotton from Troy [to West Point or Norfolk for export, or to Brunswick, Savannah, or Charleston for any purpose] no higher rate of charge to these ports than is charged and collected on such shipments from Montgomery aforesaid.

It will be noticed that the long and short haul clause is not applied to any east-bound shipments from Troy except shipments of cotton. As stated at the opening of this brief, it is unnecessary to consider shipments over the Central of Georgia, because that road is bound to meet the rates of the shorter line or abandon the Troy business.

The Alabama Midland rates are subject to the long and short haul clause; for competition is not a dissimilarity of circumstances and conditions within the meaning of that clause, and competition is the only excuse for special privileges to Montgomery (Brief for Appellee, p. 46):

> So far as said order of the Commission is concerned, the only question of law for this court to decide is, whether competition of any kind, and if so, of what kind, can be considered as one of the circumstances and conditions referred to in the fourth section of the act.

The competition at Montgomery is relevant only to inquiries by the Commission upon application of the railroad company under the proviso to § 4. No such application has been made; and had such an application been made and decided, no power is given to review the decision of the Commission.

(5, 6.)

On shipments of class goods from New York [etc. and] of phosphate rock from South Carolina and Florida fields to Troy aforesaid, no higher rate of charge than is charged and collected on such shipments through Troy to Montgomery aforesaid.

These clauses are supported by the same arguments as the clauses last before considered. It will be noticed that the long and short haul clause is not applied in favor of Troy except as to class goods from the northeast and phosphate rock from the two States of South Carolina and Florida.

It is respectfully submitted that the decrees of the lower courts should be reversed and that the circuit court should be directed to enforce the order of the Interstate Commerce Commission.

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